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IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA, *ex rel.* SANTO CAMINITO,

Respondent,

—against—

ROBERT E. MURPHY, as Warden of Auburn Prison, State of New York and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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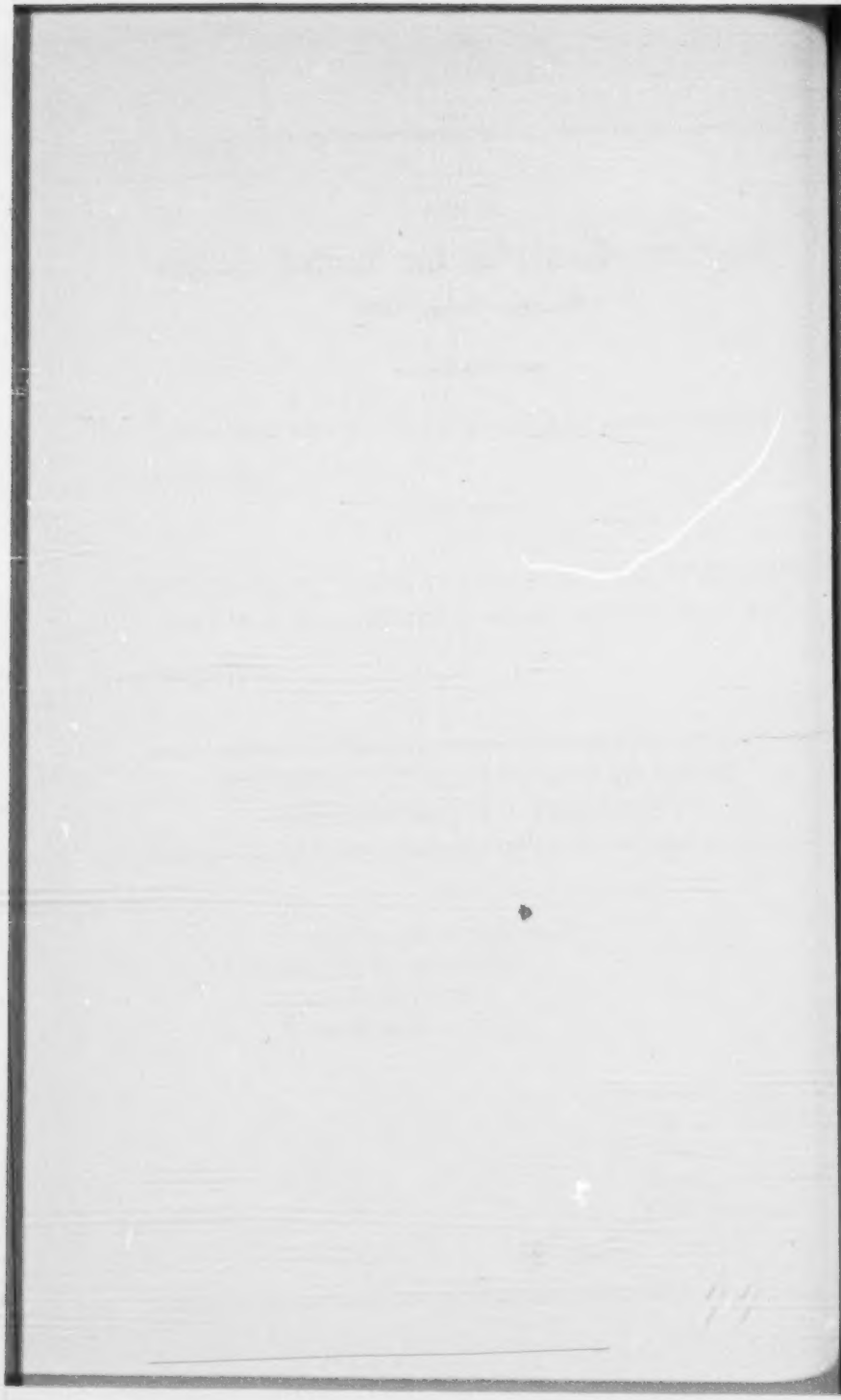

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Statement

The warden of Auburn Prison, State of New York, and the People of the State of New York, as petitioners, seek a review of a judgment of the United States Court of Appeals for the Second Circuit, entered on May 11, 1955, which judgment reversed an order of the United States District Court for the Northern District of New York, denying Caminito's petition for a writ of habeas corpus. The Court of Appeals granted the writ. The respondent is presently free on bail.

The basis for the granting of the writ of habeas corpus was the unanimous finding of the Court of Appeals that

the trial which resulted in Caminito's conviction, did not meet the standards of due process prescribed in the Fourteenth Amendment of the Constitution of the United States because the conviction was based upon the use of coerced confessions.

The respondent at the time of his arrest and conviction had no previous police record, was married, lived at home with his wife, his son and his parents and had been continuously employed by the same firm for a period of eleven years. The original conviction was for murder in the first degree. The jury recommended leniency and respondent was sentenced to life imprisonment. He remained in prison under that sentence for a period of thirteen years until his release on bail on June 7, 1955, subsequent to the judgment of the United States Court of Appeals, a review of which judgment is now sought.

Previous Proceedings

The petition to this Court recites, in part, the proceedings heretofore had. We do not repeate the recital contained in the petition, but direct this Court's attention to the following further proceedings, not mentioned in the petition.

On May 20, 1955, an order was signed by Honorable James T. Foley, United States District Judge for the Northern District of New York, in accordance with the opinion of the United States Court of Appeals of May 11, 1955, vacating and setting aside the prior order of said District Court, entered January 11, 1955; granting the petition for a writ of habeas corpus, discharging Caminito from the custody of the Warden of Auburn Prison, and

directing his transfer to the New York authorities for such further proceedings as may be required under the pending indictment.

Thereafter, in June, 1955, an order was entered in the County Court of Kings County, based upon the aforesaid judgment, making said judgment the judgment of the said County Court of Kings County.

Subsequent thereto, a motion was made in the County Court of Kings County for an order (a) dismissing the indictment upon the ground that the evidence in support thereof is insufficient in law to warrant the finding thereof, or in the alternative (b) admitting the defendant to bail pending further proceedings with respect to said indictment. The motion was opposed by the District Attorney of Kings County for the reason that it was intended that the present application to review the judgment of the United States Court of Appeals would be made to this Court. After argument, Honorable George Joyce, County Judge of Kings County, granted bail to the respondent, but directed that the application to dismiss the indictment be held in abeyance pending the disposition to be made by this Court.

Thereafter, and on June 7, 1955, Caminito was released on bail, awaiting the further disposition of this Court and of the County Court of Kings County.

The Issue and the Standard for Decision

The sole issue presented to the District Court and to the Court of Appeals for the Second Circuit was whether, in the light of the undisputed material facts, the New York courts failed to accord to Caminito the due process of law

to which he was entitled under accepted and established Federal constitutional standards.

The case must be determined solely upon a consideration of the effect of the uncontradicted facts. As stated by this Court:

> "As the burden of overturning the conviction rests on the applicant, he should allege specifically in cases where material, the uncontradicted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights." (*Brown* v. *Allen*, 344 U. S. 443, footnote 6 to majority opinion.)

In accordance with the foregoing, the presentation made on respondent's behalf in the United States Court of Appeals was governed by the specific, material, uncontradicted evidentiary facts. The decision of that Court was likewise based upon the uncontradicted evidence contained in the record of the trial.

The Undisputed Material Facts*

In setting forth the facts upon which the decision below rested, we deliberately separated the *undisputed material facts* from other assertions claimed by Caminito at the trial, in order to simplify and clarify the issues. We did not then and do not now belabor the *disputed* questions of fact, as to whether Caminito or his co-defendants were physically beaten, threatened or kept without food for a period of two days, as to which assertions there is ample evidence in the record. Our appeal to the United States Court of Appeals was confined to the clearly undisputed

* References herein contained relate to the numbered folios in the Record on Appeal to the New York Court of Appeals, copy of which is filed with this Court.

facts, all of which came from the testimony of the People's witnesses at the trial.

At no time did the District Attorney even assert that the presentation of the undisputed facts heretofore made on Caminito's behalf was incorrect. The proof that our presentation was accurate appears from the fact that the statement of undisputed material facts contained in the majority opinion of the Circuit Court of Appeals was copied almost word for word from our brief in that Court.

Accordingly, we utilize the same method of presentation. The following are the *undisputed facts as testified to by the witnesses for the State of New York:*

(1) Caminito was taken into custody on Sunday, May 11, 1941 at 6 P.M. (147).

(2) Commencing about 9 P.M. of said date, he was continuously interrogated by five or six police officers for a period of approximately five hours, until 2 A.M. the following morning, Monday, May 12th (309-312, 499, 502-537, 1061).

(3) At 2 A.M. on Monday, May 12th, Caminito was locked in a cell in which there was no bed, spring, mattress, pillow or blankets, but only a wooden bench (306, 319, 549).

(4) At 10 A.M. on Monday, May 12th, the questioning was resumed. The interrogation continued all day, with several detectives taking turns (325-328, 337).

(5) Members of Caminito's family, his friends and an attorney retained by the family, called at the station house where he was kept and tried to get information concerning his whereabouts. The police officers knew the facts, but

kept him incommunicado. The interrogation continued. No one, including his lawyer, was permitted to see him until he was arraigned 40 hours after being taken into custody (350, 548, 1063-70).

(6) During the afternoon of Monday, May 12th, two women and a man were brought in to face Caminito. He was not told that they were detectives. Each falsely pretended to identify him as the person who was sitting at the wheel of the automobile at the time of the shooting (83, 796-825, 835-853).

(7) About 9 P.M., Monday, May 12th, twenty-seven hours after having been taken into custody, Caminito signed a confession (686-693). A second confession was thereafter given to a District Attorney a short time thereafter (870-875).

(8) About 2:30 or 3 A.M. the following morning, Tuesday, May 13th, Caminito was placed under arrest (417).

(9) Caminito was brought before a magistrate later that same day, more than forty hours after having first been taken into custody (147, 351, 1074). The arraignment could and should have been held long before that time. The police officers knew that the courts were open for that purpose (1105).

(10) No evidence, other than the confessions, was offered at the trial to identify Caminito as a participant in the murder (1181).

(11) Caminito was never previously convicted of a crime (18).

In order to establish that all of the foregoing assertions are justified, and to avoid the necessity of a complete re-

view of the record, we quote briefly from the *testimony of the People's witnesses*:

Caminito was questioned for hours by relays of detectives:

"Q. And who did the questioning? A. I spoke to him for a while; Detective Manus spoke to him; Lieutenant Meenahan, and later on the captain of the Homicide Squad, Captain McGowan" (212).

* * * * *

"Q. What time did this questioning begin, about? A. About nine o'clock" (213).

"Q. About how many came between the time you just said and the time you left? A. Detective Mitchell, Manes, Garvey, Lieutenant Meenahan, myself, Mitchell from the Homicide Squad, and then later on that night Detective Gavin, Captain McGowan and Captain Dowdell" (309).

* * * * *

"Q. How many detectives were working up until 2 A.M. in the morning on this case? A. Just those that started at 5:15. There was myself, Kenny, Manes, Garvey and Mitchell" (1061).

* * * * *

"Q. During all this time that I just related, there were at least a half a dozen detectives in the station house working on this particular case with you? A. Well, not Sunday evening.

Q. Sunday evening you told us, there were four beside yourself? A. Five of us, that is right. Then Monday morning there were quite a number of detectives on other cases" (1140-1141).

* * * * *

"Q. Would you say that at least the five that worked on Sunday, with some additions, worked Monday? A. Yes, then we would add Captain

Dowdell Monday and Captain McGowan Monday" (1141).

Caminito was kept in custody overnight with no sleeping facilities—a form of physical torture:

"Q. And at two o'clock in the morning, what if anything occurred? A. Put them back in the cells and I went home and went to bed and they went to sleep in the cells" (216).

* * * * *

"Q. Did you see the cells at the Lawrence Avenue station, the cells where they keep prisoners? A. Yes.

Q. Personally? A. Yes.

Q. Is there a bed in them? A. There is a big wooden bench where they lie down.

Q. There is no bed? A. No spring and mattress.

Q. Just a wooden bench? A. Yes.

Q. No blankets or pillow? A. No" (306).

* * * * *

"Q. Going back to the cells of the Lawrence Avenue station, did you personally see any blanket there that night? A. I did not" (319).

* * * * *

"Q. Did you put him in a cell at the 62nd? A. I did.

Q. Personally? A. Yes.

Q. Each one in a separate cell? A. That is right.

Q. Bonino and Caminito? A. That is right.

Q. Was there a bench in that cell? A. There is.

Q. No bed? A. No bed.

Q. No blanket, no pillow? A. No" (548).

Caminito was not permitted to see members of his family or a lawyer who attempted to see him.

From the testimony of Detective Kenny:

"Q. In the meantime, did you see any members of their family at either precinct—yes or no? A. Yes.

* * * * *

Q. Did you let the family speak to them or they to the family? A. No.

* * * * *

Q. And between the time that you arrested them and the time that you arraigned them Tuesday morning, do you know of your own knowledge that they had no counsel? A. They did not" (350-351).

The supervising police lieutenant, John J. Meenahan (the same officer who was more recently in charge of the investigation in the *Leyra* case) knew that Caminito's lawyer, as well as his family and friends, were trying to see him during the period of unlawful detention and interrogation. From Lieutenant Meenahan's testimony:

"Q. Did any police officer tell you that the family of Bonino or Caminito were around the 62nd Precinct Sunday night and making inquiries for them? A. I had seen some people there.

Q. Did they speak to you personally? A. No.

Q. Did anyone speak to you about the family desiring to see them? A. I know that there were some friends there. Whether they were family or friends, I knew they were there.

Q. They did not see the defendant? A. No, sir, they did not.

Q. Nor the defendants them? A. No, sir" (1063-1064).

* * * * *

"Q. So that until 2 A.M. on May 12, 1941, you, as the supervising officer, did not inform the District

Attorney's office that you had three suspects at the station house? A. I did not.

• • • • •

Q. Up until 2 A.M. did any lawyer by the name of Spano make any inquiry from you, or in your presence from anyone, concerning his desire to see the defendant?

The Court: That is a rather ambiguous question, isn't it? You mean did a lawyer by the name of Spano?

Mr. Barshay: I said 'any lawyer by the name of Spano.'

Q. A lawyer by the name of Spano? A. I had knowledge that he was making inquiries.

Q. You had personal knowledge of that? A. I did.

Q. And, Lieutenant, was he permitted to see the defendants? A. No, sir, he was not" (1068-1069).

• • • • •

"Q. He did not see them, to your personal knowledge, until they were arraigned? A. That is right" (1070).

The police officers violated the statutes against unlawful delay in arraignment:

"Q. You knew the District Attorney's office was open 24 hours a day? A. I did" (1064).

• • • • •

"Q. You knew that the Night Court was open Sunday night, May 11, 1941? A. Yes, sir, I knew that.

Q. You knew there was the Felony Court open Monday, May 12, 1941? A. Yes, sir.

Q. You knew there was a Night Court open May 12, 1941? A. That is right" (1106).

A period of 40 hours elapsed between the taking of Caminito into custody and arraigning him before a magistrate:

"Q. Detective Mitchell, did you arrest the defendant, Santo Caminito? A. Yes, I picked him up for investigation.

Q. At what time? A. On May 11th at about 6:00 P.M." (147).

• • • • •

"Q. Were you present at the arraignment the following morning (Tuesday)? A. No, I was there until they were printed and booked, and then I did not see him after that" (1054).

• • • • •

"Q. Lieutenant Meenahan, from May 11, 1941, until they were arraigned, May 13, 1941, did Lieutenant McNally work on the case with you? A. He was in and out of the office and he was working on other angles on the case" (1074).

• • • • •

"Q. So you arraigned them in the Felony Court Tuesday morning? A. That is correct.

Q. At about what hour, sir? A. About somewheres in the neighborhood of 10 A.M." (351).

The trial Court, in its incorrect charge, referred to a 36-hour delay (2189-2193). The Court was wrong. The delay was of forty hours' duration, running from 6 P.M. on Sunday, May 11, to 10 A.M., Tuesday, May 13.

Caminito was subjected to improper psychological pressure.

During the period of unlawful detention, Caminito was compelled to witness and submit to a police performance consisting of false identification. Three detectives falsely

represented that they had seen him at the scene of the crime. Quoting from the District Attorney's opening statement:

> "The following morning the detectives decided something had to be done if they were going to get anywhere with this case. They thereafter sent to New York for two female detectives from the Pickpocket Squad and another detective named Gavin, who they thought looked nothing like a detective, and these defendants were placed in a room and one by one these witnesses, alleged witnesses, were brought in, and they ostensibly identified these defendants as perpetrators of the crime, although they were not actually witnesses to the crime" (82-83).

The testimony of the three detectives is lengthy and not quoted herein. It appears at folios 792 to 830, and 835 to 861 of the record.

There was no other proof of guilt.

Establishing the fact that there were no witnesses to the crime, and, therefore, that the coerced confessions constituted the sole basis for the conviction, we quote the following from the testimony of Police Captain John J. McGowan:

> "Q. In this case there were no witnesses, were there, no eyewitnesses? A. No, sir" (1177).

The District Attorney's opening statement conceded that Caminito was not identified as a perpetrator of the crime:

> "I want to say further that the confession made by these people will be substantiated as to some of the details by the persons who were there at the time, although they cannot identify these people as the perpetrators of the crime" (89).

From the foregoing, and from a review of the record as a whole, it appears that fifteen different police officers participated in the questioning and false identification during the forty hours while respondent was held in custody without arraignment. This does not include the Assistant District Attorney who appeared late in the evening of Monday, May 12th.

The following additional *undisputed* facts (taken from Caminito's testimony, and not questioned by any witness for the People) are significant:

At the time he was taken into custody, respondent was married, he had an eight-year old son, he was living with his wife, his parents and other members of his family, and he had been employed by one firm as a dress cutter for a period of ten or eleven years (1676, 1679-1681).

We do not quote from the testimony of Joseph C. Spano, an attorney retained by Caminito's family and who was given false information concerning Caminito's detention (1297-1332), nor the testimony of the several defendants to the effect that they were beaten, held without food, threatened and abused, nor the testimony of various members of Caminito's family to the effect that they made attempts to see him while he was in custody, but were likewise given false information.

Applicable Constitutional and Statutory Provisions

The petition fails to include all of the pertinent statutory references required by this Court in its consideration of this application.

The material provisions are as follows:

(A) Constitution of the United States, Section 1 of the Fourteenth Amendment:

"• • • nor shall any State deprive any person of life, liberty or property, without due process of law; • • •."

(B) Constitution of the United States, Fifth Amendment:

"• • • nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law • • •."

(C) Constitution of the State of New York, Article 1, Section 6:

"• • • nor shall he be compelled in any criminal case to be a witness against himself;

"• • • No person shall be deprived of life, liberty or property without due process of law."

(D) Code of Criminal Procedure of the State of New York:

(1) "Section 395. Confession of Defendant, When Evidence, and its Effect.

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(2) "Section 165. Defendant, Upon Arrest, to be Taken Before Magistrate:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

(E) Penal Law of the State of New York:

"Section 1844. Delaying To Take Person Arrested for Crime Before a Magistrate.

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such persons before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

(F) New York City Criminal Courts Act:

"Section 101. Courts to be Held Daily in Each District.

"Except as otherwise provided in this section, there shall be a city magistrate's court held daily in every court district, and unless otherwise directed by the chief city magistrate, each city magistrate's court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon, and the city magistrate assigned thereto shall be in attendance thereat except during a reasonable recess."

The Decisions Below

The original habeas corpus petition was presented to Hon. James T. Foley, Judge of the United States District Court for the Northern District of New York. Judge Foley, in his decision (127 F. Supp. 689) recognized Caminito's right to a Federal determination of the constitutional questions raised, but found the obligation to review the decision of the New York Court of Appeals an "uncomfortable duty". The opinion of Judge Foley demon-

strates that his decision denying the habeas corpus petition was made principally in reliance upon the jury verdict in relation to the disputed facts, and the reputation of the New York Court of Appeals in condemning third degree methods.

But in reaching his conclusion, Judge Foley was seriously disturbed. He stated:

> "Of course, there are many factors that are disturbing and cause suspicion. The holding of the defendants incommunicado, the sleeping on a hard bench without pillow or blanket in a cell probably not overheated, the failure to arraign without unnecessary delay as provided by law, the admittedly false identifications, the intensive questioning by relays of detectives,—this combination together with the fact that the relator had never been arrested or convicted, would cause hesitation and suspicion on my part. So would the fact that there is little, if any, independent evidence connecting the relator with the commission of the crime" (127 F. Supp. p. 691).

The United States Court of Appeals, in its consideration of the case, gave proper emphasis to the *undisputed* facts, the *cumulative* effect of which convinced all three judges of that Court that the violation of the due process clause of the Fourteenth Amendment was beyond question. The Court has no doubt that the confessions were improperly admitted into evidence because the factual circumstances under which they were procured established clearly that they were made under fear and coercion. We find it most significant that Judge Clark, the Chief Judge of the Court of Appeals, commenced his concurring opinion with the

statement that "Since the coercion here was so much more direct and extensive than that in *Leyra* v. *Denno,* 347 U. S. 556, I agree that we must reverse on the authority of that case." This Court is fully familiar with the circumstances under which the confession in the *Leyra* case was procured.

Basis for Denial of Petition for Certiorari

We urge that the District Attorney's petition for certiorari be denied for the following reasons:

1. The petition ignores the *undisputed* facts and relies upon a confusing, inaccurate and incomplete resume of *disputed and undisputed* facts.

2. The petition omits significant facts and presents matters not contained in the record at all, as we shall demonstrate.

3. The petition ignores the *cumulative* effect of the *undisputed* facts. It attempts to prove absence of coercion by a showing that each separate fact would not justify a finding of lack of due process.

4. The petition presents legal arguments which refer to factual matters not contained in the record of the trial, as will be shown, and draws unwarranted conclusions from prior opinions of this Court.

5. The determination below was patently correct and completely consistent with prior determinations of this Court. All of the cases relied upon by petitioner, are, upon examination, authorities in respondent's favor.

6. There having been a Federal review of the constitutional questions raised, under proper standards as laid

down by this Court, the petition fails to show any basis for further Federal review.

The Confusing and Inaccurate Factual Presentation Contained in the Petition

Pages 5 through 24 of the petition contain what purports to be a resume of the material facts. As the Court will observe, the statement mingles disputed and undisputed facts. The Court below, however, did not undertake to weigh all of the evidence upon which the jury verdict rested. It had no responsibility to do so. If the respondent's habeas corpus application had rested upon disputed facts which had been previously determined by a jury and reviewed by the State courts, there would have been no Federal question to determine, and the disposition made by the State courts properly could have been given controlling weight. This was the holding in *Stein* v. *New York*, 346 U. S. 156, where this Court stated that in the "absence of impeachment by conceded facts" decisive respect should be given to the determination of the New York Court of Appeals. However, in this case the impeachment of the confessions rests upon a series of uncontradicted facts, recited in detail in the opinion below, and the Court properly made a determination based upon Federal constitutional standards.

In an attempt to offset the decision below, the efforts of the District Attorney are now directed toward weakening or belittling the effect of the said conceded facts. The effort is of no avail.

We do not attempt to analyze with minuteness the factual statements contained in pages 5 through 24 of the

petition. Since the decision must rest on the undisputed facts the petition's review of all of the facts is, we believe, irrelevant. We must point out, however, that the statement contains glaring inaccuracies. For example:

At page 5 the petition discusses the testimony of Detectives Mitchell and Kenny. The petition states: "Detective Edward Mitchell took respondent into custody for investigation on May 11, 1941" (147). In the next paragraph, discussing Detective Kenny's testimony, it is stated: "After a conversation with them he apprehended respondent (200) and took him at about 9:00 P.M. (206) to the station house."

The reader is left with the impression that respondent was first taken into custody at 9 P.M. on May 11. Actually he was taken into custody at 6 P.M., which is a most significant fact. Had the summary been accurately presented the District Attorney could not have missed this testimony:

> "Q. Detective Mitchell, did you arrest the defendant Santo Caminito? A. Yes, I picked him up for investigation.
>
> Q. At what time? A. On May 11th at about 6 P.M." (147).

Other inaccuracies, as well as the admitted use of matters outside the record will be demonstrated. So, the petition urges that the respondent was not interrogated almost continuously for 27 hours, and that the questioning of all three suspects occurred separately. Again the record shows otherwise. For, while one particular police officer may have questioned each suspect individually during part of the time, the respondent and the others were never left alone. When one officer completed a series of questions in

one room, the respondent was then taken to another room where the interrogation by another officer resumed. And even if short periods of time did occur during which there was a let-up the compulsion engendered by the detention, the continuous presence of policemen, the inability to see family or friends, and the lack of sleep, nevertheless prevailed throughout.

But primarily we submit that the mathematical conjecture of the petition that the respondent was not questioned almost continuously for 27 hours, but "in all likelihood" the total did not approach a fourth or fifth of that period of time, is without factual substantiation.

Caminito was arrested at 6 P.M. on May 11 (147). The questioning took place from 9 P.M. until 2 A.M. the next day (213-215). The suspects were shuttled from room to room (312) but always remained in the presence of police officers (315-316). Four detectives participated in the interrogation (212). At 2 A.M., or later (1087) Caminito was locked in a cell, under conditions heretofore described. Despite further conjecture in the petition that respondent slept, the only testimony in the record is that he did not sleep. At 10 A.M. on Monday (324) the interrogation resumed, and continued until 4 o'clock in the afternoon (327-328). Detective Kenny testified that he, Lt. Meenahan, Detective Manes and Detective Garvey all questioned the respondent "all that day" (325). The following testimony is significant:

> "Q. Did they, too (referring to Meenahan, Manes and Garvey) question the defendant Caminito about this case? A. Yes.
>
> Q. Until what time, sir? A. All that day.

Q. Let us get at least up to twelve o'clock. Let us subdivide it if we can. Let us say up to twelve o'clock. A. Yes. We spoke to him until twelve.

Q. How many times? A. Did not stop asking him questions.

Q. Each one took a turn? A. That is correct.

Q. Was he again shifted from room to room or taken from room to room? A. Taken from room to room.

Q. And up to twelve o'clock, Mr. Kenny, is it a fact that the defendant Caminito denied participation in this crime? A. Yes, sir.

* * * * *

Q. You did not leave the station house other than you say, to go for coffee? A. That is correct.

Q. Then you came back? A. Yes, sir.

Q. Did you continue to question the defendant Caminito? A. I did.

Q. Up until what hour? A. Maybe four o'clock in the afternoon.

Q. And did the others question them up until four o'clock in the afternoon? A. Yes.

Q. Each one took a chance? A. Yes.

Q. About how many all together do you say participated? A. Lieutenant Meenahan, Detective Manes.

Q. Detective Mitchell? A. And Detective Mitchell, yes."

How the District Attorney can argue, in the face of the foregoing testimony, that the respondent was not interrogated for hours at a time by relays of police officers, or that he was not under constant and unremitting pressure, compulsion and terror for a continuous period of 27 hours, is beyond comprehension.

On the contrary, so intense and unrelenting was the questioning of Caminito that when respondent wanted to visit the men's room, Lt. Meenahan went with him, firing questions all the time. So Lt. Meenahan himself testified:

> "Q. Did you take either of the prisoners into the wash room and question them in there at any time? A. If I took them in there, while I was with them I was talking to them all the time.
>
> Q. Lieutenant, you personally don't escort a prisoner into the wash room? A. If I am talking to them, I don't bother to call a detective; I get up and walk in with him if he wants to go, and I talk to him, and if I talk to him, I talk to him" (1110).

The record establishes that during the forty hours of his detention, 15 policemen participated in the unremitting investigation and questioning of the respondent before his confession to an Assistant District Attorney. These police officers included an assistant chief inspector, two police captains, two lieutenants, nine detectives and a police investigator. The names of those who participated and the folio references substantiating their participation are listed as follows:

> Assistant Chief Inspector Reynolds (616)*
> Captain McGowan (212, 309, 616, 1141, 1160-1211)
> Captain Dowdell (309, 616, 1141)
> Lieutenant Meenahan (212, 328, 616, 1030-1159)
> Lieutenant McNally (1072, 1074)
> Detective Mitchell (147, 309, 328, 960-1021)
> Detective Kenny (212, 499, 1034)
> Detective Manes (212, 499, 1034)
> Detective Gavin (309, 835-859)
> Detective Garvey (961, 1061)
> Detective Tietze (817, 1042)

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* All folio references relate to testimony of police officers.

Detective Orr (803, 1042)
Detective Gilhuley (607)
Detective Ruocco (550-551, 2047)
Investigator Foley (863)

Nine police officers were present when the respondent's so-called confession was being taken (705; see also 614-616).

The District Attorney states that there is no evidence to support the conclusion that while kept overnight respondent was unable to sleep. At one point in the petition, the assertion is made that the suspects were placed in cells "where they slept" (Petition, p. 6). Again the assertion is not in accord with the facts. The only police testimony on the subject is by Detective Kenny, who when asked directly whether the prisoners slept, answered, "I do not know" (217). The only positive evidence on this subject is, of course, by the respondent, who testified that he could not and did not sleep (1742).

In an attempt to demonstrate that the cell was not particularly cold, the petition lists the temperatures during the night in question (footnote, p. 41). Although the material given is not in the record, we are grateful to the District Attorney for proving at this point that the temperatures (between 49° and 53° from 1 A.M. to 8 A.M.) were sufficiently cold to require covering and accordingly to prevent sleep since no covering was supplied. When respondent was locked in a cell after 2 A.M. Monday morning he was exhausted. The strain of his arrest at 6 P.M. the preceding day, the constant interrogation for five hours from 9 P.M. to 2 A.M., and the inability to communicate with relatives and friends were, in themselves, sufficient to inculcate fear and apprehension. To argue that he was

able to sleep that night on a hard bench with no facilities for warmth and comfort is to make a thoroughly unrealistic assumption. The sleepless night was then followed by the resumption of the interrogation on Monday, which interrogation continued, in the words of Detective Kenny, "all that day." The confession followed the lengthy grilling on Sunday evening, the sleepless night, and the all day interrogation on Monday. At that point respondent was so fatigued and worn, and so physically and mentally harassed as to be unable to withstand the strain and pressure any longer. Yet the petition blandly condones these unconstitutional police methods and even attempts to justify them.

The weakness of the petition is best demonstrated by the unwarranted statement (p. 43) that "While the record does not disclose it, there can be no question that the police had received information—quite likely from underworld sources and informers—which connected Caminito and his co-defendants with the Hammeroff murders."

Not only is the aforesaid assertion completely outside of the record, but the statement is highly prejudicial and improper. We have no concern about any influence the statement may have upon this Court but we certainly feel that the People's advocate should scrupulously avoid the use of this kind of inflammatory and conjectural hearsay. Particularly so when the record shows that the respondent was never previously convicted of a crime (18); that at the time of his arrest he was married, lived with his family and had held the same job for eleven years (1679-1681, 1676).

Throughout the petition (and particularly at pages 45 to 46 thereof) reference is made to the fact that Caminito's

"confession" occurred only after he had talked with one of the co-defendants. An attempt is made to draw an inference from the fact that the confession did follow such a conference, that none of the other factors present in the case had anything to do with the confession. The inference is unsound and without basis. The reason for Caminito's confessions were made clear from his own testimony at the trial:

> "Q. Will you tell the Court and jury why you answered the questions of the police captain? A. Well, the way they treated me, they were always threatening they were going to hit me, they were going to lock up my wife. I had not eaten. I was hit.
>
> Q. Were you in fear? A. Sure I was in fear. I was scared all the way through because as soon as I walked into the station house they started to hit me.
>
> Q. And were you in the same position when Mr. Heffernan questioned you? A. Sure, I was still scared.
>
> Q. Were the detectives still present at all times? A. They were always there" (1793).
>
> • • • • •
>
> "I gave those answers for fear, because I was getting beat. They were pulling my hair. They did not want to give me anything to eat. They would not let me notify my family, and I knew that they could not say I did it because I knew I wasn't there. • • • " (1788).
>
> • • • • •
>
> "Q. And you say that you confessed to committing this murder because you were afraid they would lock up your wife; is that right?
>
> • • • • •

A. Not only locking up my wife; I did not eat; I did not sleep; for two days they are threatening me they are going to put me in the hospital" (1882-3).

The conclusions reached in the petition, therefore, that the confessions were voluntary, rest upon misstatements of fact, conjecture and baseless inferences. The petition ignores the uncontroverted facts as well as the cumulative effect of such facts.

The Applicable Law

The principles of law which govern the disposition of this petition are thoroughly known to the Court. The decision of the United States Court of Appeals is completely consistent with the applicable cases decided by this Court. The case of *Leyra* v. *Denno*, 347 U. S. 556 is the most recent in a long line of decisions which reversed convictions procured through the use of confessions obtained by means of psychological pressures or physical torture or abuse, or where illegal detention for a long period of time occurred.

The rule of law applicable to this case is clearly stated in the *Leyra* decision: "The use in a State Court criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."

The cases principally relied on by the petitioner are:

Stein v. *U. S.*, 346 U. S. 156;
Lisenba v. *California*, 314 U. S. 219;
Lyons v. *Oklahoma*, 322 U. S. 596.

Each case is readily distinguishable on its facts from the case at bar. Moreover, an examination of the language employed in the opinions and of the facts in each of said cases shows beyond question that the standards for decision employed by the United States Court of Appeals in this case were thoroughly in accord with the principles laid down in the cases cited by the petitioner.

In the *Stein* case the confession was corroborated by other evidence, including eyewitness identification. The first confession, that of defendant Cooper, was made after Cooper had drawn a hard bargain with the police with respect to his father and brother, and much of the 32 hours he was in custody before confessing was consumed in negotiating said bargain. Moreover, the confession was not made to police officers, but to parole officials who had been called in at his request. Accordingly, the claims of physical violence and psychological coercion were outweighed, in the mind of the majority of the Court, by the circumstances surrounding the confession itself.

The *Lisenba* case involved claims of coercion based almost exclusively on conflicting testimony. The only uncontradicted fact was that petitioner was questioned for protracted periods, eleven days apart, while he was under arrest on a charge of incest. However, Lisenba was not held incommunicado, as was the respondent in this case. Lisenba was permitted to see his attorney on three occasions, and his attorney so testified. At another time, a telephone call was made to his attorney, at his request. The ultimate decision—despite vigorous dissents—was based on the fact that all of the claims of petitioner, except one, rested on sharply *disputed* issues of fact which

had been resolved against petitioner on his trial (see quotation at p. 29 of appellee's brief).

The case at bar, on the contrary, rests on *undisputed* facts.

The *Lyons* case involved the validity of a second confession made twelve hours after the first. The first confession was admittedly not made voluntarily because it was provoked after a pan of human bones was placed on the prisoner's knees. The second confession was made after petitioner had been transferred from the control of the Sheriff to that of the Warden. As in *Lisenba,* the circumstances surrounding the detention and treatment of the prisoner (for example, whether he had been subjected to physical violence) were sharply disputed. The only undisputed fact was the gruesome circumstance under which the first confession was procured. The Court apparently felt that the impact of the fear which evoked the first confession did not continue to be so coercive after the passage of time and change of surroundings as to require rejection of the second confession.

We confess difficulty in finding a basis for agreement with the Supreme Court in the *Lyons* case. Distinguished members of the bench likewise disagreed. Yet some understanding of the result can be found in the absence of a series of *undisputed* invalidating factors such as are present in the case at bar. Again the result was produced because most of the arguments urged by petitioner were based on *conflicting* facts, which facts had been resolved against petitioner by the triers of the facts.

None of the cases cited by petitioner involve a series of undisputed facts such as are present in this case. Giving

full consideration to the decisions of the New York Courts as triers of the *disputed* issues of fact (beatings, threats against members of respondent's family, denial of food, etc.) the *admitted* facts under our enlightened system of justice, demonstrated a grave miscarriage of justice requiring federal intervention.

The petition argues at great length that the decisions of the State courts should be accorded overwhelming weight. We have heretofore pointed out that the *Stein* case, upon which the petition strongly relies, agrees with that argument, except in instances where there is an impeachment of the confession by conceded facts. Such impeachment exists in this case. The *Stein* case, therefore, is authority for the respondent.

The true test which demonstrates that the determination of the United States Court of Appeals was correct is stated simply in the *Lisenba* case, also strongly relied upon by the petitioner. This Court in that case, stated:

> "* * * The fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking" (p. 236).

In our view, the opinions in the cases of *Leyra* v. *Denno*, and *Malinski* v. *New York*, 324 U. S. 401, in both of which cases the United States Supreme Court reversed the Court of Appeals of the State of New York, constitute sufficient justification for a denial of this application. In the *Malinski* case there was no question whatsoever as to guilt of the defendant. Confessions made by him which

were perfectly admissible were ample to justify the conviction. The reversal, however, was required as a matter of due process by reason of the admission of other confessions to the police, which confessions, in the view of the Court, were improperly obtained. In that case, as in this case, there were complaints that the defendant was subjected to physical violence. The Court disregarded that factor because it was disputed. It was not disputed, however, that the defendant in the *Malinski* case was held by the police from Friday morning, October 23, 1942, until 4 A.M. on the following Tuesday, when he was arraigned. Defendant made two confessions to the police, one about 5:30 or 6 P.M. on the Friday when he was taken into custody. The second confession was made on Tuesday, October 27th. Both confessions were improperly admitted into evidence. The present case, however, is even more shocking than the *Malinski* case, in that this respondent was kept totally incommunicado in spite of the fact that relatives and an attorney attempted to see him without success. In the *Malinski* case the defendant was permitted to consult with a friend.

We quote the following from the opinion of the Court in the *Malinski* case. From the majority opinion:

> "If the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant (*Ashcraft* v. *Tennessee*, 322 U. S. 143). And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict (*Lyons* v. *Oklahoma*, 322 U. S. 596, 597)" (p. 404).

Concerning the first confession, the Court referred to the fact that the claimed beatings were denied, stating:

> "Malinski was held incommunicado; he was not allowed to see a lawyer, though he asked for one, and he was not allowed to see friends with one exception" (p. 405).
>
> "* * * the confession of October 23rd was the product of fear—one on which we could not permit a person to stand convicted for a crime" (p. 407).
>
> "* * * we must consider the case, therefore, as one in which a coerced confession was employed to obtain a conviction. Coerced confessions would find a way of corrupting the trial if we sanctioned the use made of the October 23rd confession in this case. Constitutional rights may suffer as much from subtle intrusions as from direct disregard" (p. 410).

Accordingly, the Court refused to permit the first confession, made about 10 hours before the arrest, to stand. In the case at bar, it should be observed that the defendant steadfastly maintained his innocence for a period of 27 hours.

Concerning the second confession, the opinion of Mr. Justice Frankfurter states:

> "Considering the circumstances of Malinski's detention, the long and continuous questioning, the wilful and wrongful delay in his arraignment, and the opportunity that that gives for securing, by extortion, confessions such as were introduced in evidence, the flagrant justification by the prosecutor of this illegality as a necessary police procedure, inevitably calculated to excite the jury—all these in combination are so below the standards by which the criminal law, especially in a capital case, should be

enforced, as to fall short of due process of law" (pp. 417-418).

The *Leyra* and *Malinski* cases do not stand alone. They are but milestones in a long series of similar cases in which this Court has consistently held that due process is violated under circumstances such as exist in the instant case.

Extensive quotation from the applicable authorities appears unnecessary. Accordingly, we set forth briefly the conclusions reached in those cases which we consider most pertinent on their facts.

In *Chambers* v. *Florida,* 309 U. S. 227, the petitioners were subjected to continuous questioning for several days and were not permitted to see counsel, friends or relatives. The Court held that the confessions violated due process.

In *White* v. *Texas,* 310 U. S. 530, under similar circumstances, the Court again held that the confession was invalid.

In *McNabb* v. *United States,* 318 U. S. 332, the petitioners were arrested on a Thursday, between 1 and 2 A.M., and were questioned almost continuously until 2 A.M., Saturday morning, when they confessed. They were not permitted to see friends or relatives or attorney. The conviction was reversed.

In *Ashcraft* v. *Tennessee,* 322 U. S. 143, the petitioner was held incommunicado for a period of 36 hours before he was arraigned before a Magistrate. Despite the existence of evidence sufficient to convict without the use of confessions, it was held that there was a violation of due process.

In *Harris* v. *South Carolina,* 338 U. S. 68, it was again held that confessions procured prior to a delayed arraignment through systematic and persistent interrogation over long periods of time, in the absence of friends or relatives, was inadmissible as a violation of due process.

The same ruling was rendered in *Turner* v. *Pennsylvania,* 338 U. S. 62, and in *Watts* v. *Indiana,* 338 U. S. 49.

In *Haley* v. *Ohio,* 332 U. S. 596, the petitioner was arrested at midnight, October 19, 1945. He was questioned by the police for five hours without an opportunity to consult friend or counsel. After five hours, and after being shown confessions of others, he confessed. Thereafter, he was held incommunicado until October 23rd, when he was taken before a Magistrate. The judgment of conviction was reversed as a violation of due process.

In *Upshaw* v. *U. S.,* 335 U. S. 410, petitioner was detained for 34 hours. The evidence shows that he was not physically mistreated, nor subjected to psychological pressure. Nevertheless, it was held that the confessions obtained during said time were wrongful and inadmissible.

We contend that this Court cannot overlook these compelling authorities. The fact that the respondent was held incommunicado for a period of forty hours before arraignment, that there was persistent interrogation over long periods of time by squads of police officers; that he was not permitted to see members of his family who inquired about him; that he was not permitted to see an attorney who had been retained for him; that he was kept overnight in a cell which had no sleeping facilities, that he was subjected to trickery and deceit by being confronted with false witnesses, all indicate without question that he was a victim

of the type of psychological pressure which is totally inconsistent with the constitutional and statutory safeguards to which he was entitled. A review of the record shows that respondent, after persistent questioning for many hours, was emotionally and physically exhausted. It is not surprising, therefore, that the so-called confessions are in substantial accord with the suggestions made to him by the detectives who questioned him.

Under the circumstances, the applicable rule to be followed should be consistent with this Court's determinations in the cases referred to herein. We see no difference between this case and the *Leyra* case, in which it was said:

> "We hold that the use of confessions exacted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law, as required by our Constitution."

This respondent was sentenced to serve a term of life imprisonment. Without the use of the confessions admitted in evidence against him, the conviction could not possibly stand.

The case has been subjected to searching federal scrutiny, under proper constitutional standards. There is no novel principle of law involved nor any substantial issue of sufficient magnitude to require a review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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October, 1955.

Respectfully submitted,

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